Supreme Court, U.S.
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No. 85-1024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ELLEN V. PLISKA, Petitioner,

v.

STEEL KING INDUSTRIES, INC., Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 26, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Was it error to instruct the jury that the petitioner, Ellen Pliska, had the burden to prove by a preponderance of the credible evidence that she was paid a wage less than a wage paid to a male employee for equal work performed which required similar skills, efforts and responsibility substantially equal to those required of a male and that the job was performed under similar working conditions?

Answered by Court of Appeals: No

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The respondent Steel King Industries, Inc. submits the following brief in opposition to petitioner's Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE

1. Respondent's Evidence Rebutted Petitioner's Testimony That Her Work Was Equal to That of Male Employee.

At the trial in the District Court, petitioner contended that she was paid a lesser wage than a male employee Terry Wenzel for an equal job the performance of which required equal skill, effort and responsibility and which was performed under similar working conditions. Respondent submitted evidence to the contrary. Terry Wenzel was an experienced traffic manager who had been hired to set up a traffic department for respondent. Record 78 p. 93-95. After setting up the traffic department he continued to work for respondent but less than 50% of his time was spent in the traffic department, the remaining time being spent as plant manager in the production department. Record 78 p.

67, 68 and 96. During the latter part of his employment the company sales decreased and eventually the company filed under the Bankruptcy Act.

Ellen Pliska, the petitioner, who had no previous experience in the traffic department was named as the replacement for Terry Wenzel but only with respect to duties in the traffic department and none in the plant. Record 78 p. 64. She had nothing to do with setting up the department, she had no duties in the plant and while she was working as Terry Wenzel's replacement in the traffic department the company's sales had decreased by 50% and it had filed for protection under Chapter 11 of the Bankruptcy Act.

The trial court instructed the jury as follows:

"For you to find that Steel King Industries did not pay plaintiff, Ellen Pliska, compensation equal to that of male employees, you must find that plaintiff has proven the following by a preponderance of the credible evidence. First of all, that the plaintiff performed work equal to Terry Wenzel, in that the job she performed requires skills, effort and responsibility substantially similar -- excuse me -- substantially equal to those required of Terry Wenzel and that the job was performed under working conditions similar to those of Terry Wenzel; and, two, that plaintiff was paid a wage less than the wage paid to Terry Wenzel." Record 76, p. 123, 124.

2. Court's Statement on "Prima Facie Case" Referred Only to Respondent's Motion for Directed Verdict.

At the close of petitioner's case respondent moved the court for a directed verdict dismissing the petitioner's case. The court stated "At this time I'm not prepared to grant the defendant's motion for directed verdict. I think that the plaintiff has met the burden of putting on a

prima facie case." Record 76 p. 23. The court then directed the respondent to put on its case, which it did. Petitioner, in its statement of the case has erroneously stated that "...the court found that the petitioner had met the burden of putting on a prima facie case." On page 9 and 10 of her brief. Petitioner has taken the trial court's comments out of context and her statement is contrary to the decision of the Court of Appeals which held, "Viewed in context, the District Judge's statement that Pliska had established a 'prima facie case' was meant only to convey her finding that Pliska had introduced sufficient evidence to survive a motion for directed verdict."

SUMMARY OF ARGUMENT

Petitioner has completely misinterpreted the question of "burden of proof". It would seem that she would have the court rule that once a female has been paid a

different wage than a male employee that she has met the burden of proving a "prima facie" case. She fails to take into consideration the remainder of the applicable law that requires a further showing that the inequal pay must be for equal work. The Court of Appeals decided Corning Glass Works v. Brennan, 94 S.Ct. 2223 (1974). In the Corning case the United States Supreme Court stated:

> "...once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." (emphasis ours) p. 2229

The Corning rule was followed in Epstein v. Secretary, United States Department of Treasury, 739 F.2d 274, 277 (7th Cir. 1984). In Epstein the court held:

> "A prima facie case of a violation of the Equal Pay Act is analytically quite simple.[5] As

> the district court noted, the plaintiff's initial burden is to prove that 'an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions'' ..." p. 277 (footnote omitted)

Respondent submitted substantial testimony refuting petitioner's contention that the work she performed was equal and required equal skill, equal effort and equal responsibility as that of the male employee, Terry Wenzel. As a result an issue of fact existed and it was up to the jury to determine whether or not petitioner had met her burden. The District Court properly instructed the jury and the jury found that she had not met that burden.

As pointed out in the Supplemental Statement of Fact, petitioner has erroneously stated that the court found that the petitioner had meet the burden of

putting on a prima facie case. As the Court of Appeals ruled, the trial court did not find that the petitioner had established a prima facie case. Taken in context, the trial court's statement "was meant only to convey her finding that Pliska had introduced sufficient evidence to survive a motion for a directed verdict." The trial court's finding is substantiated by the commonly used and accepted definition of the terms. In Black's Law Dictionary (5th Edition 1979) at page 1071 it is stated:

> "A prima facie case consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a non-jury case; it is the evidence necessary to require defendant to proceed with his case. White v. Abrams, C.A. Cal., 495 Fed. 2d 724, 729. Courts use concept of 'prima facie' case in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation

> he asserts; this means plaintiff's evidence is sufficient to allow his case to go to jury, and (2) courts use 'prima facie' to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it. Husbands v. Com. of Penn., D.C. Penn. 395 Fed. Supp. 1107, 1139."

CONCLUSION

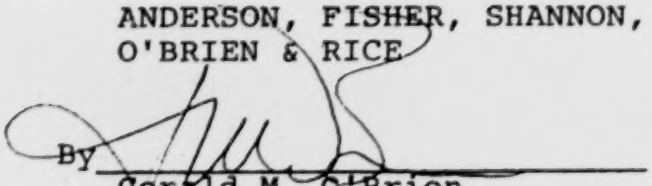
The trial court properly instructed the jury with respect to petitioner's burden of proof in this case. The Court of Appeals upheld this instruction citing its own case law which relied upon the language of the The United States Supreme Court. There is no error, there is no inconsistency and

petitioner's request for a Writ of Certiorari should be denied.

Dated December 26, 1985.

Respectfully submitted,

ANDERSON, FISHER, SHANNON,
O'BRIEN & RICE



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*Steel King Industries, Inc. has no parent companies, subsidiaries or affiliates.